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ABSTRACT

This paper discusses copyright issues, focusing on changes due to digital technology. Highlights include: problems for copyright posed by digital technologies, i.e., the identification of copyright works and owners, and the enforcement of copyright rights; electronic monitoring of copyright uses to provide rights owners with data on usage; the need for copyright owners to be able to enforce their rights if they are to participate in the trading of rights on the Internet; issues raised by the use of technological measures and legislative amendments to protect digital work from unauthorized use; new systems for enforcing copyright on the Internet; the politics of the copyright debate; the relationship between collecting societies and libraries; and the possibility of a partnership rather than an adversarial relationship between advocates for access and protection. (MES)

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Intellectual Property: Access and Protection

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Proceedings

Intellectual property: access and protection

David Emery

In 1998/99, on behalf of copyright owners around the world, reproduction rights organisations such as Copyright Agency Limited collected well over $400 million in copying payments generated from more than 30 countries. International activity in this field has never been greater, especially in Western nations.

Collecting societies make a market out of copyright infringement, and we are not going away. Despite the uncertain outcomes of complex and sometimes crude legal action by copyright owners in response to the emergence of digital music programs like Napster, copyright is not becoming obsolete.

There is simply too much at stake.

New technologies place immense pressure on the balance between the interests of copyright users and rightsholders. Digital technology permits copyright works to be copied, transferred, stored, manipulated, and transmitted in ways and on a scale that current legal systems could never have contemplated.

The widespread adoption of new digital media has led to claims that "copyright is dead". I do not believe this is the case. Copyright is a robust system of protection that adapted to new technologies such as the radio, the phonogram and television during the last century. And it will adapt to the Internet, and whatever comes next.

The recent activity in law reform in our region to comply with the TRIPS Agreement indicates that copyright protection is still important in facilitating international trade. As the Attorney-General's Department has stated at this conference, copyright laws should act as "enablers".

However, digital technologies do pose particular problems for copyright in two areas:

- the identification of copyright works and owners; and
- in enforcement of copyright rights.

Only by monitoring the use of their works can creators and publishers of digital information exercise their legal and economic rights to manage consumption and copying of their material. And only by managing the use of their work in this way will the commercial relationship between users and rightsholders flourish on-line, thereby maintaining the incentive to create works of quality and value to the community.

Around the world, methods for digital monitoring of copyright uses are being developed as we speak. These business models are likely to have many advantages, particularly in terms of covering more copyright transactions, and the accuracy of the data that makes intellectual property management possible. Electronic Copyright Management Systems (ECMS) will offer authors and publishers a greater opportunity to identify when and where their works are used and obtain fair payment for the new networked uses of their works where this was not previously possible.

In an analogue - or hard-copy - world, obtaining permissions for copying from books or articles is cumbersome. Just to photocopy a book, it may be necessary to clear rights from the author, the publisher, and the artist or photographers of any included artistic works.

Digital technology magnifies this issue because of the re-use of existing works in many digital

products. For example, one recent Australian multi-media project required 6000 permissions from copyright owners - it was abandoned after substantial investment due to the time and cost involved in negotiating all of the necessary permissions.

Authors and publishers must ensure that there is a practical and cost-effective means of seeking copying permission as quickly as the work can be transmitted or copied - this has to be done automatically, probably through the use of metadata.

It can be difficult or impossible to identify a particular work when that work is combined with a number of others in a multimedia product. It is a very simple exercise to copy text from one source - whether it be scanned from print to digital or copied from file to file etc. and to (deliberately or inadvertently) omit details identifying the rightsholder.

Digital technologies facilitate consumer "sampling" of copyright works, typically the taking of excerpts from a variety of sources, regardless of the medium. Readers no longer always want a whole book: they want a chapter or a page or a photo. It is also difficult to prove definitively that one digital copy has come from another - format and content can be altered easily to avoid detection. These are all protection issues.

Without identification details such as metadata, the rightsholder quickly loses control over the use of the work. It is easily copied - or manipulated - and distributed, unattributed and unpaid.

Negotiating terms and conditions for the use of any particular digital work can be difficult in an environment where the future use of that work is uncertain. The uncertainty can range from the number of future "hits" on a work to the uncertainty surrounding "repurposing" uses which are not addressed in licensing agreements.

Many rightsholders are now justifiably wary about the rights that they licence, in what manner and for what price.

Electronic monitoring of copyright uses will provide rights owners with valuable data on usage of their works. This data will assist rightsholders in setting appropriate terms and conditions for use ranging from pay-per-view to free use.

It is difficult to control the distribution and transmission of material in a digital environment. In the past, there was an inherently limited distribution of copyright works due to the static physical nature of the print medium and limited availability of expensive reproduction technology. Now, a single work or a libraries' entire collection can be cheaply distributed around the world instantly, without loss of quality and without losing the original.

The ease of distribution (together with technical and financial pressures) has allowed libraries to transform themselves from archives to information brokers. It has also allowed the mushrooming of paper and digital document delivery services.

Even if copyright owners are able to identify their work - and manage access to it through the use of an ECMS -- rightsholders will still not place valuable copyright work on a digital network unless they can ensure that:

- safeguards have been implemented to reduce the risk of infringement of copyright to a commercially acceptable level; and
- subsequent use of that copyright work can be monitored and payment for that use made.

Copyright owners will not participate in the trading of rights on the Internet if they are not able to enforce their rights.

For this reason, rightsowners are investing in all kinds "technological protection" - ranging from encryption, to read only access, to password protection and many more options.

I do not propose here to discuss these initiatives - merely to comment that they are an essential part of any market for the supply of copyright works on the Internet.

However, the existence of such devices raises questions for governments - nationally and internationally.

These issues range from security of government-held data to ensuring fair access to copyright works. There are also considerations of how to facilitate access to copyright works for public policy reasons, such as education and news reporting.

Copyright owners are increasingly relying on a combination of technological measures and legislative amendments to protect their digital work from unauthorised use, while users are pressing for wider legal exceptions to override technological security. Their purpose is to ensure some level of "public interest" access to copyright works, motivated by their concerns that copyright owners will lock up their works entirely if these exceptions are not available.

Here is the nub of the protection and access debate.

Whether the use of protective devices, and legislation against unauthorised circumvention of such devices, will be effective is yet to be seen. Many commentators still see the Internet as some kind of wild west, and doubt that systems for regulating the use of copyright material will be effective.

But systems have been developed for enforcing copyright on the Internet. An obvious example is the new system for registering and arbitrating ownership of domain names, through ICANN and WIPO. Elsewhere, the banking and travel industries have demonstrated high levels of security in the way they manage confidential online information.

Some believe that the future of copyright is bleak. The form in which we create and transmit information is increasingly fluid and no longer confined to tangible media like paper, vinyl and celluloid. So it is difficult to apply traditional methods of copyright protection and administration to digital media.

Still, much of this scepticism refers to delays in reforming the legal framework in which we currently operate, and fails to take account of viable technological solutions.

If technology can provide a cost-effective means of protecting digital material there will be fewer losses through unauthorised use, and a rational market should react by lowering the unit cost of access to original on-line works.

The Australian Consumers Association correctly told this conference that, far from overtaking copyright, technology has the potential to create a protection regime that copyright owners have only dreamed about.

Which brings us back to the question of access and the public interest dimensions of the copyright debate.

I want to focus now on the politics of the copyright debate, and the necessary relationship between collecting societies and libraries.

I have spent the last two years as an advocate for the rights of the many thousands of authors and publishers who are members, of CAL as part of the process of reforming Australian copyright law via what was known as the Digital Agenda Bill.

If the long debate over access and protection has taught me anything, it is that both users and creators have been poorly served by the costly and combative process of pitching our respective views to policy-makers. I do not believe Australian copyright law is as good as it could be. This is not the fault of the Government. It has played the role of facilitator and arbiter, as it should.

Nor is it the fault of the politicians. Copyright is not a partisan issue; it's a public policy issue. It seems to me to be madness that users and creators should engage in a pitched battle over such an important matter. Users and creators cannot live without one another, and indeed are natural allies in my view. But we no longer behave that way, to our collective disadvantage.

I believe this mode of action has outlived its usefulness, and I am calling for a co-operative debate as we move towards the next review of copyright law.

In my view, we have in a sense become victims of the ascendancy of economic rationalism across all governments. There are some basic truths as to why we find ourselves combatants in the eternal debate over access and protection that we need to revisit if we are to create a new relationship.

Like many key public institutions, libraries have had their public funding successively reduced over the years as governments strive for accountability and efficiency. And like other public institutions, the reaction is two-fold; cost cutting on one hand and an increase in revenue raising or cost-recovery activities on the other. And while efficiency is an admirable goal, in a world ruled by the balance sheet items like copyright fees are too easily portrayed as just another outgoing to be reduced.

A debate that should be about our intellectual future, about gaining the greatest benefit from our intellectual efforts, is reduced to arguments about cost and administrative burdens. I agree with Tom Cochrane's comment to delegates that fundamental values have not played a great enough part in this debate.

If we are serious about our regard for the public interest, then I believe we can do more for the groups and individuals we represent by taking a more co-operative approach to the crucial issues of access and protection. In the end it is we who determine how copyright law is structured. It is our compromises, or lack of compromise, that affect creators and owners of intellectual property, that affect the daily work of librarians and the ways in which we all use information.

I am not naive enough to imagine that we can resolve our differences completely, but the Digital Agenda debate has convinced me that we not serving our constituencies to the best of our abilities.

We should be using our collective power to shape public policy on access and protection in a more productive manner.

Vast resources have been devoted to mounting political campaigns to protect our entrenched positions on access and protection. I propose that, as a start, we divert these resources to researching:

- how copyright information is handled by libraries and information services,
- what the true levels of copying are,
- what information is used for,
- what uses should be remunerable, and at what rates; and
- what material should be free.

As a collecting society, CAL is looking at new and better methods of determining what is copied and how licence fees can be distributed. We would also like to work closely with the library and information sector to define and develop new ways of balancing protection and access.

I am issuing a challenge to both sides of this debate to work together before approaching the government on access and protection issues in the coming review of copyright legislation. And I'm offering a commitment from our side of the argument to engage constructively in the process.

Over the course of the Digital Agenda debate, the constant cry was for that of "certainty". Certainty in the law, in process and in rights. What events such as this conference show us is that certainty is probably the one thing we are not going to find in our struggle to resolve the tensions of access and protection.

Now, more than ever in the history of copyright, is the time we should be working together, sharing resources and developing better solutions. We are the best resource of certainty there is.

We owe it to ourselves to examine some of the premises underlying our attachment to our positions in the print environment, especially since the balance we have supposedly achieved may in truth be more like a stalemate. Let's look at "free copying" provisions as an example.

The escalation in journal prices illustrates the point: users believe publishers charge a price that reflects what publishers *think* they are losing, because users make copies under fair dealing and library provisions. Users cancel subscriptions and make more copies because they cannot afford the journals, then publishers charge more because they perceive that these copies are further displacing subscriptions.

If we don't stop to take another look at this situation, we will only perpetuate a system that frustrates all parties well into the 21st century.

Free copying isn't free. We tend to think that such provisions in the legislation protect us from price escalations; we think they balance the rights of users and owners by providing us free access to the ideas contained in protected works.

In truth, access is getting more expensive and our libraries are spending more money on fewer titles. There is an enormous cost associated with "free" access if one considers the prices for books and journal subscriptions and adds to that the actual costs of making a copy.

Think about a typical copying activity, for example reproducing a journal article in a library. If you include *all* the costs, the time away from other work (lost productivity), transportation costs, the money going into the copy machine, the paper, the people the library has to hire to tend to all the consumables associated with copying, and then imagine the millions of copies made around Australia every day, you may begin to appreciate the enormity of the resources that go into making "free" copies.

Or let's examine the assumption that access provisions in our laws help to contain costs - because as library budgets continue to shrink and the price of information continues to escalate, there will remain an urgent need to contain costs in any manner possible. So long as library access provisions and fair dealing are believed to save money, users will not be willing to consider alternatives.

Cost savings are presumed to flow from the exercise of access rights as protection against unreasonable escalations in the price of access to information. But what if price escalations may in fact be *caused by users' reliance upon access rights* rather than the other way around?

Alternatively, from the copyright owner's perspective, what if the benefit from the right to charge ever-higher prices for books and periodicals is counterproductive? There is only so much money in the information community and the more that goes to high-priced journals, the less goes to books, and the more a book costs, the fewer are purchased.

If both owners and users could be mistaken regarding the extent to which their rights provide them with power to control events, then we should at least be willing to discuss ways of making copyright law work more efficiently, rather than funding our battles.

As long as either party to negotiations focuses on non-negotiable demands and reserves the right to be unreasonable, the other party will not be willing to give up its similar non-negotiable demands or its right to be unreasonable, and we'll get nowhere.

Endless escalation in prices will be met by more extensive reliance upon access rights and other legal exceptions; spiralling technological controls to prevent access will be met by equally sophisticated countermeasures by users. Do we really want to keep going in this direction?

Advocates for access and protection are not locked into an adversarial relationship. There are options. Although no option is particularly easy or attractive because all involve rather fundamental changes in our perspectives on the problems, the electronic environment does offer us an opportunity to step back and take a different view.

At a minimum, we have to acknowledge that *we do not need to be adversaries* -- that we are in fact different pieces in the same puzzle. We are the different elements in an equation. We are both necessary and important to any solution. We can work together in ways that enlarge the return to all of us, not just financially, but in terms of the creation of knowledge and education. We can recognise that our powers should not be used to bludgeon each other, but to support and encourage each other.

We can verify right now where being adversarial has led: litigation. And we can reasonably predict that if we carry on fighting about the electronic environment we will still be doing battle in the Copyright Tribunal, accompanied by a renewed and more extravagant waste of resources. Or, alternatively, we could decide not to be adversaries.

I endorse Phillip Blackwell's remark to delegates that "a partnership may be the way forward", and agreed with Sir Anthony Mason when he told the conference that "there are different approaches". Approaching the way forward needs to be thought about long and hard.

This is the challenge. We have three years until the Government reviews the amended Act. Our time starts now.

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http://www.alia.org.au/conferences/alia2000/proceedings/david.emery.html

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